Supreme Court, U.S.
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No. 09-1146

In the Supreme Court of the United States

YUMA ANESTHESIA MEDICAL SERVICES LLC,

Petitioner,

v.

LESTER FLEMING,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

SANDRA J. CRETA
Creta Law Firm, PLLC
12725 W. Indian School Rd.
Suite E-101
Avondale, AZ 85392

ANDREW J. PINCUS
MIRIAM R. NEMETZ
ANDREW E. TAUBER
Counsel of Record
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
ataubert@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

Respondent's opposition rests on the mistaken premise that the question in this case is whether independent contractors are barred from asserting any claims at all under Section 504 of the Rehabilitation Act. But there is no dispute that independent contractors may assert claims under Section 504.

The question here is whether Section 504 allows independent contractors to assert *employment discrimination* claims in particular—a discrete subset of claims governed by the more plaintiff-friendly standards of Title I of the Americans with Disabilities Act (ADA).

The Ninth Circuit's holding that entities using independent contactors (and other entities that do not qualify as "employer[s]" under Title I of the ADA) are subject to employment discrimination claims governed by the standards of Title I means not just that those entities may be sued in private actions in which plaintiffs bear a reduced burden. More importantly, it means that such entities are required to provide disabled individuals a wide range of potentially costly and burdensome accommodations *not* previously required by Section 504 outside the employer-employee context.

Respondent's attempt to diminish the conflict among the lower courts with respect to this important question are unavailing: there is no doubt that if this case had arisen in the Sixth, Eighth, or D.C. Circuits, or in Idaho state court, the dismissal of respondent's claim would have been affirmed. Nor is there any doubt that the Tenth Circuit, by contrast, would have reached the same result as the court below.

Given the large number of independent contactors, and the potential impact of this issue on the primary conduct of entities throughout the Nation, there can be no doubt that the issue is sufficiently important to warrant this Court's attention. Because the relevant facts are uncontested, this case provides an ideal vehicle for this Court resolve the issue.

I. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER INDEPENDENT CONTRACTORS MAY ASSERT EMPLOYMENT DISCRIMINATION CLAIMS UNDER SECTION 504.

Respondent suggests (Opp. 27) that the question presented in the petition is not properly before the Court in this case because, supposedly, he has not brought an employment discrimination claim. That suggestion is wrong.

Respondent's complaint alleges that he and petitioner had "executed an employment contract" and that he "suffered damages * * * including past and future lost wages" when petitioner ultimately "refused to hire" him. 1st Am. Compl. ¶¶ 11, 34, 35 (Opp. App. 4, 10). Those are the allegations of an employment discrimination claim. Indeed, when resisting petitioner's motion to dismiss, respondent consistently referred to his complaint as asserting "employment discrimination claims." See, *e.g.*, Resp. to Mot. to Dismiss (Dkt. No. 16), at 3, 7, 10, *Fleming* v. *Yuma Reg'l Med. Ctr.*, No. 2:05-cv-3906 (D. Ariz. Apr. 5, 2006).

Had respondent elected to do so, he could have brought a different claim under the Rehabilitation Act. Rather than allege employment discrimination, respondent could have alleged that petitioner "ex-

cluded" him from "participation in" a federally funded program "solely by reason of' his alleged disability. 29 U.S.C. § 794(a). Meritorious or not, such a complaint would have stated a claim under the Rehabilitation Act—a claim not alleging employment discrimination, and thus not triggering Section 504(d). But, as the Ninth Circuit recognized below, the complaint respondent actually filed was "for breach of his employment contract and employment discrimination." Pet. App. 3a.

Indeed, it is precisely because respondent's complaint alleges employment discrimination that the Ninth Circuit had to "decide whether § 504(d), which refers to 'the standards applied under Title I of the Americans with Disabilities Act * * * as such sections relate to employment,'" limits employment discrimination claims under Section 504 to those claims that are cognizable under Title I or instead permits anyone eligible to sue under Section 504 to "bring an employment discrimination claim based on the standards found in the ADA." Pet. App. 1a, 2a. By its very terms, Section 504(d) applies only to "complaint[s] alleging employment discrimination." If respondent's complaint had not alleged employment discrimination, the Ninth Circuit would have had no occasion to address the extent to which Section 504(d) incorporates Title I of the ADA.

Respondent contends that our interpretation "turns Section 504(d) into * * * the Bermuda Triangle of statutes," causing independent contractors to "disappear[] from the Section 504 universe completely." Opp. 32. But that is incorrect. Independent contractors may bring claims under Section 504. The question—presented in the petition and expressly addressed by the Ninth Circuit below—is whether

they may assert *employment discrimination* claims in particular.

Section 504 of the Rehabilitation Act expressly distinguishes employment discrimination claims from other claims. Claims brought under Section 504 are generally subject to stringent causation and *mens rea* standards. Pet. 5–6. A plaintiff typically must prove that the alleged discrimination occurred "solely by reason of" the plaintiff's alleged disability (29 U.S.C. § 794(a)), and that the defendant acted with "a *mens rea* of intentional discrimination." *Mark H.* v. *Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008) (internal quotation marks omitted).

But employment discrimination claims brought under Section 504 are—by virtue of Section 504(d)—subject to the more lenient standards of Title I of the ADA, which allow a plaintiff to prevail even if his disability was only one "motivating factor" among many for the defendant's conduct (*Martin* v. *Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1048 (9th Cir. 2009)), and even if the defendant had no discriminatory intent. See Pet. 7–8 (citing *inter alia* 42 U.S.C. § 12112(b)(3); *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52–53 (2003)).

Thus, whether a particular class of plaintiffs may assert *employment discrimination* claims, as opposed to other claims under the Rehabilitation Act, has considerable practical significance.

II. THE LOWER COURTS ARE DIVIDED OVER WHETHER SECTION 504(d) INCORPORATES THE LIMITATIONS ON EMPLOYMENT DISCRIMINATION CLAIMS FOUND IN TITLE I OF THE ADA.

As we explained in the petition (Pet. 17–24), and as the Ninth Circuit expressly acknowledged (Pet. App. 14a), the decision below deepens a clear division among the lower courts over whether Section 504(d) incorporates the limitations on employment discrimination claims found in Title I of the ADA.

Respondent strives mightily to invent distinctions between the decision below and those that conflict with it, but there can be no doubt that the question presented would be answered differently in different circuits. That lack of uniformity should be resolved by this Court.

Respondent acknowledges that the decision below "conflicts with * * * the Eighth Circuit's decision in *Wojewski*." Opp. 20. But, citing *Lewis* v. *Johanns*, 180 F. App'x 599 (8th Cir. 2006), respondent suggests that the Eighth Circuit will likely reconsider *Wojewski* and adopt "an understanding consistent with the Ninth Circuit's in this case." Opp. 21–22. There is, however, no merit to respondent's suggestion. Not only is *Lewis* an unpublished decision that pre-dates *Wojewski*, but it specifically states that "the same basic standards *and definitions* are used under the ADA and the Rehabilitation Act" (180 F. App'x at 601 (emphasis added)), a view that is consistent with *Wojewski* and contrary to the decision below.

Respondent asserts that *Levinger* is "factually distinguishable" and "does not conflict with the deci-

sion below." Opp. 17, 19. Neither assertion is correct. Respondent notes that the *Levinger* plaintiff provided his services to the defendant hospital under a contract between the hospital and a third-party service provider, rather than pursuant to a contract directly with the hospital, but that distinction is wholly immaterial. The plaintiff indisputably was an independent contractor rather than an employee. Indeed, the plaintiff's independent contractor status was the very basis for the court's conclusion, in direct conflict with the decision below, that "[c]onsequently, [plaintiff] does not have any employment discrimination rights under the ADA or the Rehabilitation Act." *Levinger* v. *Mercy Med. Ctr.*, 75 P.3d 1202, 1208 (Idaho 2003). Thus, far from being mere "dictum" as respondent claims (Opp. 19 n.17), the court's statement that the plaintiff "cannot * * * proceed with his employment discrimination claim * * * *since he is an independent contractor*" (75 P.3d at 1206 (emphasis added)) is essential to the court's opinion and the distinction it draws between employment discrimination claims and all other claims under the Rehabilitation Act. As the court recognized, plaintiff's "status as an independent contractor" prevents him from bringing an employment discrimination claim but "does not preclude Rehabilitation Act * * * claims for other than employment discrimination." *Ibid.*

That distinction between employment discrimination claims and other Section 504 claims, which the decision below failed to recognize, also lies at the heart of *Redd*. As explained in the petition (at 22–23), *Redd* held than an individual who provided services as an independent contractor could *not* maintain an employment discrimination claim under the Rehabilitation Act even though the same individual *could* bring a claim against the same defendant for

having been "unlawfully denied participation" in a federally funded program. *Redd* v. *Summers*, 232 F.3d 933, 936, 941 (D.C. Cir. 2000).[1] Thus, contrary to respondent's assertion (Opp. 18), *Redd* is *not* "in accord with the Ninth Circuit's decision in this case" but rather squarely conflicts with the decision below.

Respondent is also mistaken when he says that "there is no tension" (Opp. 15) between *Hiler* and the decision below. *Hiler* rests on the Sixth Circuit's conclusion that "individuals who do not otherwise meet the statutory definition of 'employer' cannot be held liable under the Rehabilitation Act" for employment discrimination. *Hiler* v. *Brown*, 177 F.3d 542, 547 (6th Cir. 1999). As the Ninth Circuit expressly recognized, that holding is "in conflict with" its decision in this case. Pet. App. 14a–15a.

According to respondent, the decision in *Schrader*, although "consistent with the Ninth Circuit's opinion in this case" (Opp. 15), is not implicated by the question presented here because "[t]he Tenth Circuit did not have before it * * * the question of an independent contractor's rights * * * under Section 504." *Ibid.* But that contention, while technically true, ignores the shared analytic foundation underlying both *Schrader* and the decision below. As we explained (Pet. 18–19), *Schrader* held that an individual who could not have brought an employment discrimina-

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[1] As we explained (Pet. 22 & n.7), *Redd* considered the employment discrimination claim under Section 501 rather than Section 504 because the defendant was a government agency rather than a recipient of government funds. But because Section 501(g) is materially indistinguishable from Section 504(d), there is no basis for respondent's speculation (Opp. 18) that the D.C. Circuit would reach a different result under Section 504.

tion claim under Title I of the ADA could bring such a claim under the Rehabilitation Act because, in the court's view, Section 504(d) incorporates only "the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered under the Rehabilitation Act." *Schrader* v. *Ray*, 296 F.3d 968, 972 (10th Cir. 2002). If respondent had filed his case in the Tenth Circuit, the holding in *Schrader* would have compelled the same result that the Ninth Circuit reached here, as the Tenth Circuit itself made clear by explicitly recognizing the conflict between its ruling and the Sixth Circuit's decision in *Hiler*. *Schrader*, 296 F.3d at 974.

The existence of this clear, deep divide among the lower courts is not only demonstrated by the lower courts' own recognition of their disagreement and by those courts' diametrically opposed constructions of the statute—the conflict also has been recognized by respondent's own counsel. Shortly after the decision below, respondent's counsel stated that "[c]ourts around the country have disagreed about the relationship between Title I of the ADA and Section 504 of the Rehabilitation Act," and that disagreement "on the issue makes the case ripe for review by the U.S. Supreme Court." Press Release, *Independent Contractors Protected Under Section 504 of the Rehabilitation Act*, PRWeb.com ("Press Release"), available at http://www.prweb.com/releases/2009/11/prweb3244414.htm. And two weeks after YAMS filed the instant petition, respondent's counsel, writing in an ABA publication, acknowledged that the decision below "adds to a split in the Circuits" over "whether Section 504(d) * * * incorporated only select portions of Title I * * * or whether it incorporated Title I in its entirety," with "the Ninth and Tenth Circuits pitted

against the Sixth and Eighth Circuits." Seth M. Marnin, *Circuits Split Over Whether Independent Contractors Protected Under Section 504 of the Rehabilitation Act*, ABA Section of Labor and Employment Law Flash, available at http://www.abanet.org/labor/flash/10/04/special-feature.shtml.

This well-established conflict among the lower courts calls out for this Court's intervention in order to provide nationwide uniformity in the construction of this important federal statute.

III. THE QUESTION PRESENTED IS IMPORTANT.

Respondent contends that review is unwarranted because, supposedly, "the decision below will affect few people other than the present litigants." Opp. 1. That assessment is incorrect.

First, the division among the lower courts over the proper interpretation of Section 504(d) is important because it means that recipients of federal funding must shoulder significantly different obligations under the Rehabilitation Act depending on their location alone. See Pet. 25. In the Ninth and Tenth Circuits, recipients of federal funds owe independent contractors all of the duties imposed by Title I of ADA, including the obligation to provide "reasonable accommodations" (42 U.S.C. § 12112(b)(5)(A)). In the Sixth, Eighth, and D.C. Circuits, by contrast, recipients of federal funds need not provide such accommodations. Recipients of federal funds located elsewhere cannot be certain of their statutory obligations.

Respondent accuses us of "inflat[ing] the apparent importance of this case" by purportedly "ask[ing] this Court to 'define the obligations that recipients of

federal funds owe disabled individuals,'" an issue that respondent says is "not encompassed by the question presented and * * * not properly before this Court." Opp. 24 (quoting Pet. 1). But respondent misses the point: the decision below has significant real-world consequences because it requires all recipients of federal funds to provide "reasonable accommodations" (42 U.S.C. § 12112(b)(5)(A)) to all independent contractors. That imposes a significant burden wholly apart from any claims asserted in litigation—a law-abiding recipient of federal funds will have to adjust its behavior to fulfill this, and other, new Title I obligations.

Moreover, the Ninth Circuit's decision will likely lead to increased assertions of employment discrimination claims by independent contractors under the Rehabilitation Act, both because recipients of federal funds within the Ninth Circuit will "be liable for failing to provide independent contractors with reasonable accommodations" (Press Release, *supra*) and because independent contractors will be able to invoke the more lenient standards of Title I of the ADA rather than the stringent standards that generally apply to Rehabilitation Act claims. Given the large number of independent contractors in the United States, the additional litigation burden could well be substantial.[2]

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[2] Respondent's observation that the percentage of independent contractors in the Nation's ever-growing workforce "has not changed significantly over time" (Opp. 26) misses the point. First, even if there were a "steady" percentage of the overall workforce (Opp. 26 n.22), the absolute number of independent contractors is large and growing, as respondent's counsel has admitted. Second, our argument is not that the total number of independent contractors is necessarily growing, but that the

Respondent's counsel has recognized the practical importance of the question presented. Noting that there were "an estimated 10.3 million independent contractors" as of 2005, respondent's counsel described the opinion below as a "far-reaching" and "particularly important" decision that will "alter the terrain for thousands of individuals." Press Release, *supra*.

The broad ramifications of the decision below merit this Court's attention.

IV. THE NINTH CIRCUIT ERRED.

Respondent argues that the petition should be denied because the decision below is correct. Opp. 27–38. But the Ninth Circuit's ruling contravenes the language and purpose of Section 504(d) by applying different standards to employment discrimination claims brought under the Rehabilitation Act and those brought under the ADA. Because the decision below flouts congressional intent, the petition should be granted.

1. Disavowing the Ninth Circuit's reasoning, respondent first argues (Opp. 30) that "Section 504(d) simply does not apply" here because, as an independent contractor, he is by definition incapable of bringing an employment discrimination claim. He also posits (Opp. 32) that we propose to "bar Section 504(a) suits by non-employees." But, as discussed above (at 2–3), neither assertion is true. First, respondent *did* bring an employment discrimination claim. Second, we do *not* contend that non-employees

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number of independent contractors *covered by the Rehabilitation Act* is increasing as the federal government distributes funds to an increasing number of entities to combat the current recession. See Pet. 29–30.

may not sue under Section 504. Our point is that they cannot bring *employment discrimination* claims.

2. In the alternative, respondent contends that the Ninth Circuit correctly understood Section 504(d) to incorporate the "standards of liability" of Title I of the ADA, but not its provisions regarding the "scope of coverage." Opp. 33. Yet, as the petition explains (at 32–33), Title I's anti-discrimination "standard" cannot reasonably be separated from the definitions of "qualified individual" and "employer" that it incorporates—and these allow employment discrimination claims to be brought only against "an employer" (42 U.S.C. § 12111(2)) by a person holding or seeking an "employment position" (*id.* § 12111(8)).

Moreover, Title I's requirement that the plaintiff be (or be seeking to become) an employee is undoubtedly "substantive." Opp. 36. The ADA's anti-discrimination regime was designed with the employment relationship in mind; it was never intended to be applied to non-employment relationships. It is for this reason Congress incorporated the "employee-employer" requirement within the ADA's core provisions. Under the ADA, employees of entities with 15 or more employees may bring employment discrimination claims, but independent contractors retained by such entities may not. Respondent offers no explanation why Congress—which adopted Section 504(d) "to ensure uniformity and consistency of interpretations" between the ADA and the Rehabilitation Act (S. Rep. No. 102-357, at 71 (1992))—would have wanted to treat independent contractors differently under the Rehabilitation Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS
MIRIAM R. NEMETZ
ANDREW E. TAUBER
Counsel of Record
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
atauber@mayerbrown.com

SANDRA J. CRETA
Creta Law Firm, PLLC
12725 W. Indian School Rd.
Suite E-101
Avondale, AZ 85392

Counsel for Petitioner

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